Court File No. N/M/17/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL DISTRICT OF MIRAMICHI

IN THE MATTER OF THE RECEIVERSHIP OF:

ATCON GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC., ATCON LOGISTICS INC., ATCON CONSTRUCTION INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. AND ENVIREM TECHNOLOGIES INC.

PURSUANT TO Section 33 of The *Judicature Act,* R.S.N.B. 1973, Ch. J-2*,* Rule 41, Rules of Court, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3

BETWEEN:

THE BANK OF NOVA SCOTIA, a Canadian chartered bank with a registered office in the City of Saint John, Province of New Brunswick

APPLICANT

- and –

ATCON GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC., ATCON LOGISTICS INC., ATCON CONSTRUCTION INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. AND ENVIREM TECHNOLOGIES INC., all of which are carrying on business in the Province of New Brunswick

RESPONDENTS

TWENTY-THIRD REPORT OF THE RECEIVER

(Approval of Proposed Distributions to Secured Creditors and Activities of the Receiver)
July 25, 2012

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OVERVIEW

1. This report is made by Ernst & Young Inc. ("**EYI**") in its capacity as receiver and receiver manager (the "**Receiver**") of the Atcon Group of Companies (as defined below). The report describes the realizations and anticipated realizations upon the property of the Atcon Group of Companies and an agreement that has been reached amongst the material secured creditors and the Receiver for the distribution of a significant portion of the realizations to those secured creditors. The agreement with the secured creditors took many months to achieve and is subject to the approval of the Court. For the reasons described in this report, the Receiver believes that the proposed distributions accord with the orders made by the Court in this proceeding, accord with the rights of the secured creditors and represents an efficient and fair method of allocating the proceeds of realization in what has been a complex and multi-faceted realization process.

2. This report also provides a summary of the realization and related activities of the Receiver and includes information concerning assets and property that remain subject to realization by the Receiver. As part of this report, some of the activities of EYI as monitor (the "**Monitor**") in the Atcon CCAA proceeding (the "**CCAA Proceeding**") are also described.

3. On the applications of The Bank of Nova Scotia (the "**Bank**") pursuant to section 33 of the *Judicature Act* (New Brunswick), Rule 41 of the Rules of Court of New Brunswick, and section 243 of the *Bankruptcy and Insolvency Act* (Canada) that were heard by The Honourable Mr. Justice Riordon of the Court of Queen's Bench of New Brunswick on March 1, 2010 and March 30, 2010, EYI was appointed Receiver in respect of the property, assets and undertakings (collectively, the "**Property**") of:

   (a) Atcon Group Inc., Atcon Holdings Inc., Atcon Property Holdings Inc., Atcon Veneer Products Inc. and Atcon Logistics Inc. (The Receiver was appointed in respect of these companies by order dated March 2, 2010 (the "**March 2 Order**")); and

(b) Atcon Construction Inc., Atcon Management Services Inc., Atcon Civil Ltd., Dycon Construction Ltd., Atcon Structures Inc. and Envirem Technologies Inc. (now known as 058545 N.B. Inc.) (The Receiver was appointed in respect of these companies by order dated March 30, 2010 (the "**March 30 Order**").

The March 2 Order and the March 30 Order are referred to together as the "**Receivership Orders**").

4. The Respondents are referred to in this report as the "**Atcon Group of Companies**". Not all of the affiliates of the Atcon Group of Companies are the subject of the Receivership Orders. Some of them are subsidiaries of companies that are subject to the Receivership Orders. Two of them, Atcon Plywood Inc. and Atcon Industrial Services Inc., are the subject of separate receivership proceedings being administered by PricewaterhouseCoopers Inc.

5. The Receivership Orders authorized the Receiver to, amongst other things, take possession and control of the Property of the Atcon Group of Companies and sell, convey, transfer, lease or assign the Property of the Atcon Group of Companies or any part or parts thereof out of the ordinary course of business without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000.

6. The Atcon Group of Companies and certain of their affiliates carried on business as providers of construction, industrial, and environmental services in the Province of New Brunswick, the Province of Newfoundland and Labrador, the Province of Alberta and the Northwest Territories. They had material property in each of those provinces and that territory at the beginning of these receivership proceedings.

7. The property of the Atcon Group of Companies was diverse. It included accounts receivable owed under certain contracts, equipment and inventory located in New Brunswick, Alberta, Northwest Territories and Newfoundland & Labrador, over 55 parcels of real property in New Brunswick, and an operating plywood mill in Sweden.

As a result, significant time and effort was expended by the Receiver to recover the Property of the Atcon Group of Companies for the benefit of its stakeholders.

8. Since March 1, 2010, Property of the Atcon Group of Companies in the aggregate amount of $40,449,401.38 as of May 18, 2012 has been collected and realized upon during these receivership proceedings and the related CCAA Proceeding.

9. Limited distributions have been approved and made to date. The Receiver made distributions of proceeds of an account receivable owing to Atcon Construction Inc. (“**Atcon Construction**”) and originally held in trust by the Receiver pursuant to the Order of Justice Riordon dated June 18, 2010 (referred to therein as the “Builders’ Lien Holdback”), along with accrued interest. The distributions were made by the Receiver pursuant to the Order of Justice Riordon dated October 28, 2010 granted in these receivership proceedings and were made to the following creditors:

(a) Caterpillar (as defined below), in the amount of $1,200,000, in connection with builders’ liens filed in the Province of Alberta and the Caterpillar Settlement Agreement (as defined below);

(b) Emeco (as defined below), in the amounts of $228,900.22 and $7,000, in connection with builders’ liens filed in the Province of Alberta and its costs, respectively; and

(c) the Bank, in the amount of $2,576,577.04 on account of its valid and enforceable security interest in the accounts receivable of Atcon Construction.

10. The Receiver is of the view that, as a significant portion of the Property of the Respondents has been realized upon, it is appropriate to make a distribution of certain of the realization proceeds to secured creditors that have valid and enforceable security over that Property.

11. The Receiver recognized that, before any further distribution of the realization proceeds could be implemented, it would be necessary to allocate: (a) the costs of these receivership proceedings against the realization proceeds, as this Honourable Court had

granted a first-priority "Administrative Charge" over all of the Property of the Respondents as security for payment of the reasonable fees and disbursements of the Receiver and its counsel pursuant to the Receivership Orders; and (b) the "Replacement Charge" granted over certain Property of Atcon Construction as security for any deficiency faced by a builders' lien claimant or a secured creditor as a result of the establishment of the holdbacks under the June 18, 2010 Order.

12. The Receivership Orders set out a method of allocation of costs for the Administrative Charge that requires a determination of the direct and indirect costs for the realization of Property of the Respondents and an application of such costs to the Property. The Receiver considered and determined that a line-by-line calculation of costs would be time consuming and costly for the receivership estates. The Receiver was of the view that it would be prudent to discuss with the parties with an interest in the Property a potential allocation/cost-sharing mechanism that could be agreed to by the affected parties.

13. As a result, the Receiver completed a review of the claims against the Property of the Respondents and determined that the secured creditors having the primary proprietary interests in the realization proceeds were the Bank, the Province of New Brunswick (the "**Province**"), Caterpillar Financial Services Limited ("**Caterpillar**"), GE Canada Equipment Financing G.P. and its affiliated entities (collectively, "**G.E.**") and Aviva Insurance Company of Canada and its affiliated entities (collectively, **"Aviva**" and the "**Secured Creditors**" respectively). As set out below, the Receiver has obtained legal opinions as to the validity and enforceability of the security of such parties over the applicable Property of the Respondents that resulted in the realization proceeds.

14. The Receiver entered into discussions with the Secured Creditors so that affected creditors could be consulted about a proposed allocation of the priority charges. The discussions were focussed on proposed net amounts to be distributed to each party based on the amount(s) realized for the Property of the Respondents subject to the creditor's security, taking into consideration a proposed allocation of the estate costs of these receivership proceedings to such Property and the maintenance of holdbacks in

connection with the Replacement Charge and the CRA Claims (as defined below), where applicable.

15. The Receiver has reached an agreement with all of the Secured Creditors for the distribution to them of, in aggregate, approximately $9.1 million, subject to the approval of the Court. The agreement with and amongst the Secured Creditors was achieved after the Receiver provided detailed information to each of the Secured Creditors concerning the realizations, costs and related information and documentation and following numerous discussions and meetings. Each Secured Creditor was rightly concerned to ensure that its rights and interests were respected and that the allocation of proceeds and costs was fair and reasonable from their respective perspectives. Ultimately, each of the Secured Creditors agreed to the following distributions and cost allocations:

(a) allocate to receivership costs[1]: (i) 15% of the net sale proceeds of real property identified as PID 40095887 and PID 40441917; and (ii) a pro rated recovery of direct expenses allocable to the Envirem Sale Transaction (as defined below) with respect to PID 40450389, all of which property is subject to valid and enforceable security in favour of Caterpillar (the "**Caterpillar Collateral**");

(b) distribute the balance of the net sale proceeds of the Caterpillar Collateral realized to date (being the sum of $808,629.63) to Caterpillar on account of its security in the Caterpillar Collateral;

(c) allocate to receivership costs, 5% of the net sale proceeds of the General Manson Way Property (as defined below), which is subject to valid and enforceable security in favour of G.E. (the "**G.E. Collateral**");

(d) retain out of the net sale proceeds of the G.E. Collateral the sum of $245,194.31 to be held by the Receiver pending a final determination of the CRA Claims;

(e) distribute the balance of the net sale proceeds of the G.E. Collateral (being the sum of $416,074.87) to G.E. on account of its security in the G.E. Collateral;

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[1] When used in this Twenty-Third Report, the term "receivership costs" includes the reasonable fees and disbursements of the Monitor and its counsel related to the CCAA Proceedings.

(f) allocate to receivership costs: (i) 15% of the net sale proceeds of PID 10208858; and (ii) a pro rated recovery of direct expenses allocable to the Envirem Sale Transaction with respect to PID 70245741, all of which property is subject to valid and enforceable security in favour of Aviva (the "**Aviva Collateral**");

(g) retain out of the net sale proceeds of the Aviva Collateral the sum of $102,583.82 to be held by the Receiver pending a final determination of the CRA Claims;

(h) distribute the balance of the net sale proceeds of the Aviva Collateral (being the sum of $174,076.42) to Aviva on account of its security in the Aviva Collateral;

(i) allocate to receivership costs: (i) a reimbursement of professional fees totalling $53,600.60 with respect to administrative services provided by the Receiver at the request, and for the sole benefit, of the Province; and (ii) 15% of the net sale proceeds of PID 40179152, PID 40277774, PID 40165656, the Beechwood Property (as defined below) and the Walsh Street Property (as defined below), all of which is subject to valid and enforceable security in favour of the Bank and assigned to the Province (the "**Province Collateral**");

(j) retain out of the net sale proceeds of the Province Collateral the sum of $7,675.30 to be held by the Receiver pending a final determination of the CRA Claims;

(k) distribute the balance of the net sale proceeds of the Province Collateral (being the sum of $340,879.90) to the Province on account of its security in the Province Collateral;

(l) retain on account of future costs and expenses of this proceeding, $1.0 million of the net sale proceeds of the balance of the Property of the Respondents currently held by the Receiver, which is subject to valid and enforceable security in favour of the Bank;

(m) retain out of the net sale proceeds of the Bank Collateral the sum of $4,431,376.16 to be held by the Receiver pending a final determination of the CRA Claims; and

(n) distribute the sum of $7,314,321.14 out of the net sale proceeds of the Bank Collateral to the Bank on account of its security in the Bank Collateral (as defined below).

PURPOSE OF THIS REPORT

16. As a result, the purpose of this Twenty-Third Report is to:

(a) report to this Honourable Court on the realizations of the Property of the Respondents that have occurred to date and the proceeds of such realizations in the possession of the Receiver;

(b) seek the approval of this Honourable Court of the distributions to the Secured Creditors that have been agreed to and accepted by the Secured Creditors; and

(c) seek the approval of this Honourable Court of the conduct, actions and activities of the Receiver in administering these receivership proceedings to date, including the conduct, actions and activities of the Receiver set out in this Twenty-Third Report and all other reports previously filed by the Receiver in these receivership proceedings to date.

TERMS OF REFERENCE

17. In preparing this Twenty-Third Report, the Receiver has been provided with, and has relied upon unaudited historical financial statements, other unaudited financial information and projections prepared by the Respondents, the books and records of the Respondents, discussions with certain of the former management and employees of the Respondents and certain representatives of the Secured Creditors and other information from various sources. The Receiver has assumed that the information it has been provided is accurate and complete.

18. All references to monetary amounts in this Twenty-Third Report are in Canadian dollars unless otherwise noted.

19. Capitalized terms not defined in this Twenty-Third Report are as defined in the Receivership Orders.

20. Copies of Court materials in these receivership proceedings and the CCAA Proceeding may be obtained from the Receiver's website established in connection with the Respondents (www.ey.com/ca/atcon).

BACKGROUND

Atcon Group of Companies

21. The Atcon Group of Companies was originally established in 1978 in Miramichi, New Brunswick as a provider of a variety of construction services. At its peak, the Atcon Group of Companies and related affiliates employed more than 2,000 employees internationally, had annual revenues of approximately $255 million and liabilities in excess of $250 million.

22. The Atcon Group of Companies expanded its original service offerings and geographic marketplace and it subsequently carried on business through two operating companies, Atcon Construction and Envirem Technologies Inc. (now known as 058545 N.B. Inc.) ("**Envirem**"), primarily in the following areas:

    (a) Atcon Construction provided a variety of construction and earthworks services, including:

        (i) heavy civil construction services such as dam, bridge and road construction services, including providing: engineering, design, fabrication and construction services with respect to the construction of several bridges and a road for the transport of overburden from the Athabasca Oil Sands Project in the Province of Alberta; and providing design and construction services with respect to the construction of the Deh Cho Bridge across the Mackenzie River near Fort Providence, Northwest Territories and the Kakisa Bridge across the Kakisa River in the Northwest Territories;

(ii) earthmoving, trucking, mining and ore extraction services, including the removal of muskeg in the Albian Sands area of the Province of Alberta;

(iii) equipment rental and management services with respect to the construction of the plant site works for the Vale Inco Long Harbour Processing Plant in Long Harbour, Newfoundland & Labrador (the "**Vale Inco Project**"); and

(b) Envirem manufactured, marketed and exported various organic products and provided land reclamation, soil stabilizing and remediation, seasonal mulching and site restoration services in the Province of New Brunswick.

23. The Atcon Group of Companies had a number of affiliates, which included Atcon Industrial Services Inc. ("**Atcon Industrial**") and Atcon Plywood Inc. ("**Atcon Plywood**"). Atcon Industrial carried on business providing manufacturing, machining and fabrication services to a number of industrial sectors in the Province of New Brunswick and elsewhere. Atcon Plywood carried on business as a manufacturer of plywood in the Province of New Brunswick. The operations of Atcon Industrial and Atcon Plywood were interconnected with the Respondents, as Atcon Industrial and Atcon Plywood conducted business on or adjacent to parcels of real property owned by certain of the Respondents, and Atcon Industrial often completed significant steel and other fabrication work for Atcon Construction on a sub-contract basis.

24. As a result of its diverse business operations, the Respondents had, among other Property, leased and owned Property located on current or former construction job sites, construction storage areas or quarries, and office space located in New Brunswick, Newfoundland & Labrador, Alberta and the Northwest Territories. As well, certain of the Respondents owned commercial office buildings, real property and office furnishings at various locations in Miramichi, Pointe-Verte, Wayerton, Centre Napan, Barnaby, Curventon, and Exmoor, New Brunswick. Additionally, one of the Respondents was the indirect sole owner of an operating plywood mill in Sweden.

<u>Appointment of Receiver and Trustee in Bankruptcy</u>

25. EYI was appointed as Receiver of the Property of the Respondents pursuant to the Receivership Orders. Attached hereto as **Appendix "A"** is a copy of the Receivership Orders.

26. Pursuant to the provisions of the Receivership Orders, the Receiver has been authorized and empowered by this Honourable Court to, amongst other things:

(a) take possession and control of the Property of the Respondents;

(b) receive, preserve and protect the Property of the Respondents, or any parts thereof;

(c) receive and collect all monies and accounts then owed or thereafter owing to the Respondents and to exercise all remedies of the Respondents in collecting such monies;

(d) market any or all of the Property of the Respondents, including advertising and soliciting offers in respect of the Property of the Respondents or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(e) sell, convey, transfer, lease or assign the Property of the Respondents or any part or parts thereof out of the ordinary course of business with the approval of this Court in respect of any transaction in which the purchase price exceeds $100,000 or the aggregate purchase price of all transactions less than $100,000 exceeds $1,000,000;

(f) apply for any vesting order or other orders necessary to convey the Property of the Respondents or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; and

(g) take any steps reasonably incidental to the exercise of the powers under the Receivership Orders.

27. Pursuant to the Order of Justice Riordon dated April 23, 2010 granted in this proceeding, the Receiver made an assignment in bankruptcy in the name of and on behalf of each of the Respondents. Attached hereto as **Appendix "B"** are copies of the certificates of appointment of EYI as trustee in bankruptcy ("**Trustee**") in respect of each of the Respondents (collectively, the "**Certificates**").

28. As set out in the Certificates, between April 26 and April 29, 2012, each of the Respondents was assigned into bankruptcy and EYI was appointed as Trustee.

PROPERTY REALIZATIONS

Property of the Respondents Realized to Date

Overview

29. Since its appointment in March 2010, the Receiver has taken steps, pursuant to the provisions of the Receivership Orders and in accordance with its duties as an officer of this Honourable Court, to take possession and control of, and realize upon the recovered Property of the Respondents for the benefit of the Respondents' stakeholders.

30. As noted above and as described in detail below, the Property of the Respondents consisted of a wide variety of Property located across Canada in New Brunswick, Alberta, Newfoundland & Labrador and Northwest Territories, and in Sweden. The diversity and locations of the Property, and the inter-connections amongst the Respondents, Atcon Industrial and Atcon Plywood, required the Receiver to utilize a number of differing realization methods to liquidate the Property of the Respondents, including tenders, real estate listings, auctions, litigation and joint-venture settlements, continuation of pre-receivership sales processes, and multi-party negotiations where a number of parties had an interest in the Property in question.

31. The Receiver has collected and realized upon the Property of the Respondents in the aggregate amount of $26,335,849.20 as of May 18, 2012. The principal realizations and cash receipts are summarized as follows, and a more detailed account is contained in this report:

Property/Transaction	**Cash Proceeds**
Envirem Sale Transaction	$4,235,238.93
Beechwood Property	$170,670.33
Albian Receivable	$8,432,503.30
Sharkbite Receivable	$34,351.42
Garnishment Funds	$1,246,374.23
Pennecon Settlement Amount	$3,139,859.53
General Manson Way Property	$696,072.82
Eastern Tender Property	$3,443,442.49
Western Auction Property	$541,606.12
Premier Sale Transaction	$202,000.00
Suncor Settlement	$2,500,000.00
Walsh Street Property	$246,738.53
Airport Hangar	$130,508.00
115 Whalen Street	$24,352.53
Torbay Road Property	$66,456.87
Sun Life Insurance Policy	$325,205.93
CNRL Contract Funds	$129,843.55

32. Attached hereto as **Appendix "C"** is a consolidated Statement of Receipts and Disbursements prepared by the Receiver for the period March 1, 2010 to May 18, 2012 (the "**R&D**"), and a chart setting out the net proceeds received by the Receiver with respect to the Property of the Respondents as of May 18, 2012 (the "**Net Proceeds Chart**").

33. While the R&D and the Net Proceeds Chart list total receipts of $30,665,134.99, such aggregate amount includes funds in the amount of $2,226,504.00 received by the Receiver from the accounts of the Respondents following the CCAA Proceeding, $1,200,000.00 borrowed by the Receiver pursuant to the provisions of the Receivership Orders, $167,800.04 received from the purchaser of the Envirem business for Envirem operational expenses incurred during the course of this proceeding and the CCAA Proceeding, and $734,981.75 in HST amounts. These amounts were not included in the gross Property realizations of $26,335,849.20 cited above and discussed in greater detail below, as they were not the product of Property realizations of the Receiver and do not represent net proceeds available to eventually be distributed to the appropriate

stakeholders of the Respondents. Additionally, as set out in the R&D, the $1,200,000 borrowed by the Receiver pursuant to the provisions of the Receivership Orders has been repaid.

Envirem Sale Transaction

34. Envirem previously operated a soil remediation and seasonal mulching business in the Province of New Brunswick. Prior to the commencement of this proceeding, Atcon Holdings Inc. ("**Atcon Holdings**") had retained a financial advisor, initiated a sales process for a potential sale of its sole shareholder interest in Envirem, and was in discussions regarding the potential completion of a sale transaction.

35. Following the commencement of this proceeding, a sale of substantially all of Envirem's assets was negotiated with the assistance of EYI in its capacity as Monitor in the CCAA Proceeding. The purchased assets that were to be included in the sale transaction were as follows:

(a) all Envirem inventory and raw materials;

(b) the Envirem trade accounts receivable listed on Schedule II to the sale agreement and new trade accounts receivable generated after the date of the sale agreement to the extent they were outstanding as of the closing of the sale transaction;

(c) the owned and leased Envirem vehicles, equipment and other tangible personal property used in connection with Envirem's business, including owned equipment identified on Schedule III to the sale agreement and leased equipment identified on Schedule IV to the sale agreement that the purchaser was to assume or return;

(d) Envirem intellectual property, permits, licenses, goodwill and other intangible assets, prepaid deposits and expenses;

(e) Envirem's rights under any operating agreements, leases, finance agreements and customer agreements (as listed on Schedule IV to the sale agreement);

(f) the real property owned by Envirem and all of Envirem's interest in all plants and other buildings located thereon, together with improvements, fixtures and other appurtenances, which real property is as follows:

(i) real property located in Bayside, New Brunswick with PID 15086259;

(ii) real property located in Miramichi, New Brunswick with PID 40450389;

(iii) real property located in Miramichi, New Brunswick with PID 40450355;

(iv) real property located in Fredericton, New Brunswick with PID 1483031;

(v) real property located in the County of York, New Brunswick with PID 75165209, PID 75246660 and PID 75165480;

(vi) real property located in the County of Northumberland, New Brunswick with PID 40030413;

(vii) real property located in Miramichi, New Brunswick with PID 40406282 and PID 40164311;

(g) real property owned by Atcon Construction located in the County of Westmorland, New Brunswick with PID 70245741;

(h) real property owned by 633433 N.B. Inc. located in Miramichi, New Brunswick with PID 40219883; and

(i) real property owned by 604985 N.B. Inc. located in Miramichi, New Brunswick with PID 40278327.

36. EYI, in its capacity as Monitor in the CCAA Proceeding was of the view that the sale was in the best interests of the stakeholders of Envirem and recommended that the Court approve the sale of the Envirem business.

37. Pursuant to the Approval and Vesting Order of Justice Riordon dated March 22, 2010 granted in the CCAA Proceeding and the Approval and Vesting Order of Justice Riordon

dated March 22, 2010 granted in this proceeding (collectively, the "**Envirem Orders**"), a sale transaction with respect to substantially all of the Property of Envirem was approved by this Honourable Court (the "**Envirem Sale Transaction**").

38. The Receiver reports that the Envirem Sale Transaction closed on April 28, 2011 and the net sale proceeds in the hands of the Receiver with respect to the Envirem Sale Transaction is $4,235,238.93 (the "**Envirem Sale Proceeds**").

39. The Envirem Sale Proceeds are being held by the Receiver pending an allocation of the net proceeds by this Honourable Court in accordance with the Envirem Orders. The Envirem Sale Transaction did not specify any allocation of the Envirem Sale Proceeds to specific purchased assets, other than the aggregate amount of $1,295,812.29 that was allocated to inventory, accounts receivable and prepaid expenses.

40. The Bank, Caterpillar and Aviva (collectively the "**Envirem Creditors**") hold security over various assets that were sold as part of the Envirem Sale Transaction. The Envirem Creditors, in consultation with the Receiver, have mutually agreed to a proceed/cost allocation methodology. As a result of this agreement, the Receiver proposes that the Envirem Sale Proceeds be allocated between the Envirem Creditors as follows:

(a)	The Bank	$3,371,630.78
(b)	Caterpillar	723,925.96
(c)	Aviva	138,960.24
(d)	CRA	721.95
		$4,235,238.93

Beechwood Property

41. Atcon Property Holdings Inc. ("**APH**") was the owner of a residential property municipally known as 284 Beechwood Drive, Miramichi, New Brunswick (the "**Beechwood Property**").

42. The Receiver entered into a listing agreement with a qualified local real estate agent in April 2010, and subsequently entered into an agreement of purchase and sale dated April 13, 2010 for the sale of the Beechwood Property for $185,000.

43. The Receiver was of the view that it had conducted an appropriate market test for the Beechwood Property and recommended that this Honourable Court approve the sale of the Beechwood Property. Pursuant to the Approval and Vesting Order of Justice Riordon dated May 12, 2010 granted in this proceeding, the sale of the Beechwood Property was approved by this Honourable Court.

44. The Receiver reports that it realized net proceeds in the amount of $170,670.33 with respect to the sale of the Beechwood Property (the "**Beechwood Proceeds**"), which were deposited into the Receiver's general operating account. for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Albian Receivable</u>

45. Atcon Construction previously provided earth moving, construction and related services to Albian Sands Energy Inc., an affiliate of Shell Canada ("**Albian Sands**") in the Province of Alberta under the Agreement for Earth Moving, Construction and Related Services dated November 1, 2008 between Atcon Construction and Albian Sands (the "**Albian Contract**"). The services provided by Atcon Construction were primarily related to the removal of muskeg in the Albian Oil Sands area near Fort McMurray, Alberta.

46. In connection with the services provided by Atcon Construction, an account receivable in the amount of $8,432,503.30 was determined to be owed to Atcon Construction with respect to certain unpaid invoices (the "**Albian Receivable**"). During the course of the CCAA Proceeding, the Monitor worked in concert with Atcon Construction in an effort to facilitate payment of the Albian Receivable from Albian Sands.

47. A number of parties claimed an interest in the Albian Receivable. The Canada Revenue Agency (the "**CRA**") had issued requirements to pay to Shell Canada pursuant to section 227(4) of the *Income Tax Act* (Canada) in the maximum amount of $4,750,074.57.

Emeco Canada Limited ("**Emeco**") and Caterpillar each filed statements of lien upon interest in Crown materials in respect of Shell Canada's interest in those minerals. The statements of lien were filed in connection with unpaid lease payments owed by Atcon Construction with respect to equipment claimed to be used by Atcon Construction in providing services under the Albian Contract. The Receiver also filed a statement of lien in Alberta upon interest in Crown materials in respect of Shell Canada's interest in minerals in connection with the outstanding amounts owed to Atcon Construction under the Albian Contract.

48. Following lengthy negotiations amongst the parties, the parties agreed, subject to the approval of this Honourable Court, to the payment of the Albian Receivable to the Receiver on certain terms and conditions. Pursuant to the Order of Justice Riordon dated June 18, 2010 granted in this proceeding (the "**June 18 Order**"), the Albian Receivable was treated as follows:

(a) $3,427,865.97 was allocated to a separate interest bearing trust account established by the Receiver pursuant to the June 18 Order (the "**CRA Deemed Trust Claim Holdback**") in connection with the deemed trust claim of CRA against the Property of Atcon Construction on account of alleged unremitted employee source deductions under the *Income Tax Act* (Canada), the *Employment Insurance Act* (Canada) and the *Canada Pension Plan* (the "**CRA Deemed Trust Claim**");

(b) $996,345.70 was allocated to a separate interest bearing trust account pursuant to the June 18 Order in connection with the non-deemed trust claim of the CRA (the "**CRA Non-Deemed Trust Claim Holdback**") against the Property of Atcon Construction on account of alleged amounts payable under the *Income Tax Act* (Canada), the *Employment Insurance Act* (Canada) and the *Canada Pension Plan* (the "**CRA Non-Deemed Trust Claim**" and collectively with the CRA Deemed Trust Claim, the "**CRA Claims**"); and

(c) $4,008,291.63 was held by the Receiver in a separate interest bearing trust account (the "**Builders' Lien Holdback**").

49. Following the granting of the June 18 Order, the Receiver, Caterpillar, the Bank and Emeco entered into further negotiations with respect to a potential distribution of the funds in the Builders' Lien Holdback. As a result of such negotiations, the Receiver recommended that the Court grant an Order authorizing the following distributions to be made from the Builders' Lien Holdback, which distributions were approved by the Order of Justice Riordon dated October 28, 2010 granted in this proceeding (the "**October 28 Order**"):

(a) $1,200,000 to be distributed by the Receiver to Caterpillar on account of a settlement agreement entered into between the Receiver, Caterpillar and the Bank that was approved by this Honourable Court in the October 28 Order with respect to builders' liens filed by Caterpillar (the "**Caterpillar Settlement Agreement**");

(b) $228,900.22 and $7,000 to be distributed by the Receiver to Emeco pursuant to the October 28 Order on account of its valid builders' lien and costs, respectively; and

(c) $2,576,577.04, plus all accrued interest, to be distributed by the Receiver to the Bank pursuant to the October 28 Order on account of its valid security interest in the accounts receivable of Atcon Construction.

50. The Receiver reports that it continues to maintain the CRA Deemed Trust Claim Holdback and the CRA Non- Deemed Trust Claim Holdback in separate trust accounts, and as of May 18, 2012, the amounts in such accounts were $3,814,364.93 (which include funds associated with the Garnishment Funds, more fully described below) and $1,004,241.00, inclusive of earned interest, respectively.

51. In connection with the CRA Claims, the Receiver filed notices of objection and appeals with CRA in connection with the income tax, CPP and EI assessments and re-assessments of Atcon Construction related to such claims on May 21, 2010 and on June 7, 2010. The status of such objections and appeals is discussed in greater detail below.

Sharkbite Receivable

52. Atcon Construction previously provided design, engineering, procurement and construction services to Shell Canada Energy, an affiliate of Shell Canada, pursuant to the terms and conditions of the Engineering Services Agreement dated September 26, 2009 between Atcon Construction and Shell Canada Energy, and the Engineering, Procurement and Construction Contract dated December 21, 2009 between Atcon Construction and Shell Canada Energy (collectively, the "**Sharkbite Contracts**"). The Sharkbite Contracts were with respect to the construction of bridges and roads near the Albian Oil Sands area near Fort McMurray, Alberta, and was known as the Sharkbite Project.

53. Shell Canada Energy delivered notices of termination dated February 25, 2010 to Atcon construction with respect to the Sharkbite Contracts with a termination date effective as of February 26, 2010.

54. Following a review of the books and records of Atcon Construction, the Receiver agreed to the payment of $34,351.42 (the "**Sharkbite Receivable**") proposed by Shell Canada Energy as full and final satisfaction of the obligations of Shell Canada Energy to Atcon Construction under the Sharkbite Contracts.

55. Pursuant to the June 18 Order, the Sharkbite Receivable was paid to the Receiver. The Receiver reports that the Sharkbite Receivable was deposited into the Receiver's general operating account for use by the Receiver pursuant to the June 18 Order to make payments (including interim payments) required or permitted by the Receivership Orders.

Garnishment Funds

56. A Garnishee Summons issued on December 1, 2009 by the Court of Queen's Bench of Alberta (the "**Alberta Cour**t") was served on Shell Canada and its affiliates in connection with amounts owed to Atcon Construction. The Garnishee Summons was with respect to an action commenced by Spruceland Lumber against Atcon Construction in the Province of Alberta.

57. In connection with the Garnishee Summons, Shell Canada paid $1,245,905.15 to the Alberta Court on February 26, 2010. Following the bankruptcy of Atcon Construction on April 26, 2010, the Receiver took steps and recovered the funds paid by Shell Canada to the Alberta Court, which, upon receipt, was in the amount of $1,246,374.23 (the "**Garnishment Funds**").

58. The Receiver reports that the Garnishment Funds have been dealt with as follows:

    (a) $356,410.71 was allocated to the CRA Deemed Trust Claim Holdback pursuant to the June 18 Order; and

    (b) $889,963.52 was deposited into the Receiver's general operating account for use by the Receiver pursuant to the June 18 Order to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Pennecon Settlement Amount</u>

59. Atcon Construction and Penney Construction Ltd. ("**Penney**") had entered into a joint venture to supply all labour, material, tools and equipment required to complete all civil earthworks for plant site development of the Vale Inco Project.

60. Atcon Construction provided equipment rental and management services to Pennecon Heavy Civil Ltd. ("**PHC**"), an affiliate of Penney, in connection with the construction of the Vale Inco Project. As of May 1, 2010, the aggregate amount of $3,558,810.55 was owed to Atcon Construction by PHC with respect to such services.

61. In May 2010, the Receiver entered into discussions with PHC and Penney with respect to payment of the outstanding amount, disputes with respect to alleged overcharges, and alleged amounts owed by Atcon Construction for interest, management fees and other administrative expenses under the limited partnership agreement between Atcon Construction and Penney.

62. As a result of the discussions, a settlement agreement dated May 27, 2010 was entered into which, among other things, provided for the payment of $3,222,385.00 to the Receiver (the "**Pennecon Settlement Amount**"). The Receiver was of the view that the

settlement was a fair and reasonable settlement of the matters relating to the Pennecon receivable and recommended that the Court approve the settlement.

63. Pursuant to Order of Justice Riordon dated June 30, 2010 granted in this proceeding (the "**June 30 Order**"), the settlement agreement was approved by the Court. The Receiver reports that the Pennecon Settlement Amount has been dealt with as follows:

(a) $2,024,375.23 has been received by the Receiver and used pursuant to the June 30 Order to make payments (including interim payments) required or permitted by the Receivership Orders;

(b) $268,223.77 was distributed to CRA pursuant to the June 30 Order on account of the CRA's claim under the *Excise Tax Act* (Canada); and

(c) $929,786.00 is being held by the Receiver pursuant to the June 30 Order in a separate interest bearing trust account (the "**Pennecon Holdback**") established as a result of a mechanics lien action commenced by Caterpillar in the Province of Newfoundland & Labrador (the "**Newfoundland Lien Action**").

64. The Receiver reports that, as of May 18, 2012, the Pennecon Holdback was in the amount of $937,115.86.

65. The Receiver is of the view that, as a result of the Caterpillar Settlement Agreement discussed above, which provided for a discontinuation of the Newfoundland Lien Action, it is no longer necessary for the Receiver to maintain the Pennecon Holdback in a separate trust account. The Receiver is requesting that the funds in the Pennecon Holdback be distributed to the Bank as part of the Bank Collateral, as discussed in greater detail below.

<u>General Manson Way Property</u>

66. Atcon Construction was the owner of real property and a commercial building municipally known as 67-69 General Manson Way, Miramichi, New Brunswick (the "**General Manson Way Property**"). The General Manson Way Property was leased by Atcon Construction to Atcon Industrial which operated its business from the General

Manson Way Property and from interconnected adjacent real properties owned by Atcon Industrial. Atcon Industrial maintained a significant amount of owned and leased equipment, inventory, work-in-progress and supplies at the General Manson Way Property.

67. PricewaterhouseCoopers Inc. ("**PwC**") was appointed by this Court as receiver of Atcon Industrial on March 30, 2010. PwC solicited *en bloc* offers for the sale of Atcon Industrial's property located at the General Manson Way Property, as well as for the sale of the General Manson Way Property itself.

68. PwC received an offer with respect to the sale of the General Manson Way Property, among other things, with an allocated price of $870,000 for the General Manson Way Property. The Receiver, following discussions with PwC and a review of an appraisal for the property, was of the view that the price to be paid was supported by the appraised value. The sale of the General Manson Way Property was supported, or not opposed, by the parties that had registered debentures and collateral mortgages against the property and was recommended by PwC.

69. Pursuant to the Order of Justice Riordon dated July 28, 2010 granted in this proceeding (the "**General Manson Way Order**"), the sale of the General Manson Way Property was approved by this Honourable Court.

70. The Receiver reports that it received $690,982.86 in net sale proceeds in connection with the sale of the General Manson Way Property (the "**General Manson Way Proceeds**"), which amount is being held by the Receiver pending further Order of this Honourable Court pursuant to the General Manson Way Order. The General Manson Way Proceeds are net of approximately $130,510 paid to PwC on account of its fees and disbursements relating to the sale of the General Manson Way Property and payment of certain tax arrears that formed a first charge on the General Manson Way Property.

<u>Eastern Tender Property</u>

71. Following its appointment, the Receiver identified the assets and property of Atcon Construction set out in **Appendix "D"** attached hereto located in the Province of New

Brunswick and the Province of Newfoundland & Labrador that would be suitable to form the basis of a tender sale process and potential *en bloc* sale of construction and quarry related assets (collectively, the "**Atcon Eastern Assets**").

72. Following discussions with appraisers, liquidators and auctioneers, the Receiver determined that the best method to solicit offers for the Atcon Eastern Assets was to conduct a tender process. As a result, the Receiver brought a motion on July 28, 2010 in this proceeding seeking Court approval of the proposed tender process.

73. Pursuant to the Order of Justice Riordon dated July 28, 2010 granted in this proceeding (the "**Tender and Auction Order**"), this Honourable Court approved a tender process with respect to the Atcon Eastern Assets (the "**Tender Process**").

74. Following the completion of the approved Tender Process and the tendering of offers, the Receiver identified the combination of tenders that maximized the net recovery from the Atcon Eastern Assets for the receivership estates of the Respondents.

75. Pursuant to twelve Approval and Vesting Orders of Justice Riordon dated September 29, 2010 granted in this proceeding, the sale of certain of the Atcon Eastern Assets to certain purchasers was approved by this Honourable Court.

76. The Receiver reports that it received $3,443,442.49 in net sales proceeds in connection with the sales of Atcon Eastern Assets that have been completed to date (the "**Eastern Tender Proceeds**"). The Eastern Tender Proceeds were deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Western Auction Property</u>

77. Following its appointment, the Receiver located and took control over various construction machinery and equipment (such as excavators, generators, solar powered signs, and other construction items), vehicles and trailers owned by the Respondents and located in the Province of Alberta and the Northwest Territories, which Property is

described in greater detail in **Appendix "E"** attached hereto (collectively, the "**Western Auction Property**").

78. With respect to realization options for the Western Auction Property, the Receiver was of the view that, as the Western Auction Property was comprised of small construction pieces that were remotely situated on leased lands, a competitive auction conducted on the leased lands would generate the maximum return for the receivership estate. As a result, the Receiver contacted auctioneers/liquidators and requested proposals for the sale of the Western Auction Property at a public auction.

79. Following a review of the submitted proposals, the Receiver determined that the proposal submitted by Century Services Inc. ("**Century**") was the best proposal submitted, as Century had an enhanced understanding of the property, offered a net minimum guarantee amount and a competitive commission structure. As a result, the Receiver sought Court approval on July 28, 2010 of an auction agreement entered into with Century for the Western Auction Property.

80. Pursuant to the Tender and Auction Order, this Honourable Court approved the auction agreement between Century and the Receiver with respect to the Western Auction Property.

81. The Receiver reports that it received $541,606.12 in net sale proceeds in connection with the sale of the Western Auction Property (the "**Western Auction Proceeds**"). The Western Auction Proceeds were deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Premier Sale Transaction</u>

82. As noted above, Atcon Construction provided equipment rental and management services to PHC in connection with the construction of the Vale Inco Project. Atcon Construction was the owner of ten pieces of equipment situated on the Vale Inco Project site and used by PHC (the "**Newfoundland Property**").

83. Following a consideration of potential realization options with respect to the Newfoundland Property and obtaining an appraisal for the property, the Receiver determined that it would be in the best interests of the receivership estate to determine whether PHC and Premier Construction Ltd. ("**Premier**"), an affiliate of PHCL, would be interested in acquiring the Newfoundland Property.

84. The Receiver and Premier were able to successfully negotiate an asset purchase agreement for the sale of the Newfoundland Property, which agreement was subject to Court approval. The Receiver sought approval of this Honourable Court of the sale transaction on October 28, 2010.

85. Pursuant to the Approval and Vesting Order of Justice Riordon dated October 28, 2010 granted in this proceeding, this Honourable Court approved a sale of the Newfoundland Property to Premier (the "**Premier Sale Transaction**").

86. The Receiver reports that it received $202,000 in net sale proceeds in connection with the sale of the Newfoundland Property under the Premier Sale Transaction (the "**Premier Sale Proceeds**"). The Premier Sale Proceeds were deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Suncor Settlement</u>

87. Atcon Construction was previously engaged by Suncor Energy Oil Sands Limited Partnership ("**Suncor LP**") to provide certain engineering, procurement and construction materials and services in respect of the construction of roadway infrastructure improvements at Highway #63, which is adjacent to the Suncor oil sands operations located north of Fort McMurray, Alberta (the "**Suncor Project**"). The services were to be provided pursuant to the terms of the Highway 63 Interchange Engineering, Procurement and Construction, Multiple Use Contract No. 4600004026 with an effective date of August 11, 2006 between Atcon Construction and Suncor LP (the "**Suncor Contract**").

88. As a result of a number of disputed billing issues between Atcon Construction and Suncor LP in connection with the services provided by Atcon Construction under the Suncor Contract., Atcon Construction commenced an action on May 14, 2009 by way of statement of claim against Suncor LP, Suncor Energy Inc. and Suncor Energy Services Inc. (collectively, "**Suncor**") with the Court of Queen's Bench of Alberta, Judicial Centre of Calgary (the "**Suncor Action**").

89. Following its appointment, the Receiver retained legal counsel and entered into without prejudice settlement discussions with Suncor regarding matters relating to the Suncor Action and the Suncor Contract. As a result of such discussions, a settlement of the Suncor Action was reached between the Receiver and Suncor, subject to the Receiver obtaining this Honourable Court's approval of the terms of the settlement. The Receiver was of the view that the settlement agreement represented a fair and reasonable settlement of the matters relating to the Suncor Action and the Suncor Contract, and sought Court approval of the settlement on December 3, 2010.

90. Pursuant to the Order of Justice Riordon dated December 3, 2010 granted in this proceeding, this Honourable Court approved the settlement in connection with the Suncor Action and the Suncor Contract.

91. The Receiver reports that it has received $2,500,000.00 in connection with the Suncor settlement (the "**Suncor Settlement Proceeds**"). The Suncor Settlement Proceeds were deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Walsh Street Property</u>

92. APH was the registered owner of real property and a commercial building municipally known as 170 Walsh Street, Miramichi, New Brunswick (the "**Walsh Street Property**"). The Walsh Street Property was previously leased by APH to Atcon Industrial, which operated its machining division at the Walsh Street Property. As a result of such operations, significant amounts of equipment owned by Atcon Industrial were located at

the Walsh Street Property and subject to the receivership of Atcon Industrial (the "**AIS Machining Equipment**").

93. As with the General Manson Way Property, following PwC's appointment as receiver and receiver manager of Atcon Industrial on March 30, 2010, PwC and the Receiver discussed potential methods to realize upon the AIS Machining Equipment and the Walsh Street Property in a coordinated manner that would facilitate the greatest recovery being achieved for the stakeholders of Atcon Industrial and APH.

94. The Receiver and PwC agreed that a going concern or *en bloc* sale of the AIS Machining Equipment and the Walsh Street Property would likely be in the best interests of the stakeholders of both Atcon Industrial and APH. PwC subsequently entered into an auction agreement with Infinity Asset Solutions for a going concern marketing and sale process to be conducted with respect to the Walsh Street Property, which auction agreement was approved by this Court in the Atcon Industrial receivership proceeding.

95. A sale of the Walsh Street Property did not materialize following Infinity's going concern marketing and sale process, and as a result, the Receiver listed the Walsh Street Property with a qualified local real estate agent.

96. As a result of the listing, and following a review of an appraisal for the Walsh Street Property obtained by PwC and discussions with its real estate agent, the Receiver entered into a sale agreement for the Walsh Street Property, subject to Court approval. The Receiver was of the view that the sale agreement provided a fair and reasonable realization for the Walsh Street Property and recommended that the Court approve the sale in its motion on May 10, 2011.

97. Pursuant to the Approval and Vesting Order of Justice Riordon dated May 10, 2011 granted in this proceeding, this Honourable Court approved the sale of the Walsh Street Property.

98. The Receiver reports that it received $246,738.53 in net sale proceeds in connection with the sale of the Walsh Street Property (the "**Walsh Street Proceeds**"). The Walsh Street Proceeds were deposited into the Receiver's general operating account for use by the

Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

Airport Hangar

99. Atcon Logistics Inc. was the owner of an airport hangar situated on land leased from the Miramichi Airport Commission (1993) Inc. ("**MAC**") and municipally known as 50 Airport Road, Miramichi, New Brunswick (the "**Airport Hangar**").

100. The Receiver listed the Airport Hangar with a qualified local real estate agent and received an offer to purchase in November 2010, subject to Court approval. The Receiver recommended that the Court approve the sale of the Airport Hangar which the Court did in the Approval and Vesting Order of Justice Riordon dated December 3, 2010.

101. As previously reported to this Court, the sale transaction for the Airport Hangar that was approved in December 2010 was eventually terminated, and the Receiver re-listed the Airport Hangar in February 2011.

102. The Receiver entered into an agreement of purchase of sale with MAC for the sale of the Airport Hangar, subject to Court approval. Pursuant to the Approval and Vesting Order of Justice Riordon dated August 15, 2011 granted in this proceeding, this Honourable Court approved the sale of the Airport Hangar to MAC.

103. The Receiver reports that it received $130,508.00 in net sale proceeds with respect to the sale of the Airport Hangar (the "**Airport Hangar Proceeds**"). The Airport Hangar Proceeds were deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

115 Whalen Street

104. Atcon Construction was the owner of real property municipally known as 115 Whalen Street, Miramichi, New Brunswick ("**115 Whalen Street**"). The Receiver listed the property with a qualified local real estate agent and subsequently entered into an agreement for the sale of the property for $32,000 based on an offer received.

105. Pursuant to the Vesting Order of Justice Riordon dated September 15, 2011 granted in this proceeding, this Honourable Court approved the vesting of 115 Whalen Street to the purchaser.

106. The Receiver reports that it received $24,352.53 in net proceeds with respect to the sale of 115 Whalen Street ("**115 Whalen Street Proceeds**"). The 115 Whalen Street Proceeds have been deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Torbay Road</u>

107. APH was the owner of real property municipally located on Torbay Road in Miramichi, New Brunswick and identified as PID 40441917 (the "**Torbay Road Property**"). The Receiver listed the property with a qualified local real estate agent and subsequently entered into an agreement for the sale of the property.

108. As noted above, the Receivership Orders permit the Receiver to complete a sale of the Property of the Respondents for less than $100,000 in a single transaction, and less than $1,000,000 in aggregate transactions. As the offer for the Torbay Road Property was less than $100,000, and the aggregate of such sales has not exceeded $1,000,000, and as the purchaser did not request Court approval of the sale, the sale was completed without Court approval.

109. The Receiver reports that it received $66,456.87 in net proceeds with respect to the sale of the Torbay Road Property (the "**Torbay Road Proceeds**"). The Torbay Road Proceeds have been deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

<u>Sun Life Policy</u>

110. The Receiver brought a motion in this proceeding on March 18, 2011 to recover the amount of approximately $280,000 in connection with the cash surrender value of a life

insurance policy on the life of Mr. Robert W. Tozer ("**Mr. Tozer**") where Atcon Group was the listed owner and beneficiary of the policy.

111. Pursuant to the Decision of Justice Riordon dated April 12, 2011 and the Order of Justice Riordon dated June 15, 2011 granted in this proceeding, the Receiver's motion was granted and the Receiver was authorized and directed to direct the insurer, Sun Life Financial, to terminate the life insurance policy and pay the cash surrender value of the policy to the Receiver. However, pursuant to the terms of the Order, no action was to be undertaken by the Receiver until any appeal of the Order was finally determined, and Mr. Tozer was to have thirty days following a final decision to enter into an assignment arrangement with the Receiver for the policy.

112. The Receiver reports to this Honourable Court that Mr. Tozer appealed the Decision and Order of Justice Riordon, and the appeal was heard by the Court of Appeal of New Brunswick on February 15, 2012. Mr. Tozer's appeal was dismissed by the panel of the Court of Appeal on February 15, 2012, and reasons for the Court's decision were released on July 5, 2012.

113. Following the dismissal of his appeal, Mr. Tozer agreed to pay the cash surrender value of the policy of $320,205.93 (the "**Sun Life Policy Proceeds**") to the Receiver, along with $5,000 in anticipation of costs to be awarded with respect to the appeal, in consideration for an assignment of the Sun Life policy. The Court of Appeal awarded $3,000 in costs against Mr. Tozer, and as Mr. Tozer previously paid $5,000 in costs, the Receiver returned $2,000 to Mr. Tozer on July 9, 2012 by sending a cheque in this amount to his solicitor.

114. The assignment of the Sun Life policy has been effected and the Receiver received $325,205.93 on March 8, 2010, and this amount was deposited in the Receiver's general operating account to be used by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

Other Realized Property

115. The Receiver reports that, in addition to the asset realizations described above, the Receiver is in possession of further proceeds of the Property of the Respondents realized by the Receiver, which Property proceeds includes:

(a) $442,181.77 of accounts receivable owing to Atcon Construction;

(b) $50,000.00 of aggregates owned by Atcon Construction and located in the Province of Alberta;

(c) $89,250.00 of trailer and ancillary assets owned by Atcon Construction and located in the Northwest Territories;

(d) $34,500.00 of ancillary assets owned by Atcon Construction and located in the Northwest Territories;

(e) $46,919.00 of construction equipment located in the Province of Newfoundland & Labrador;

(f) $9,863.13 of cash on hand; and

(g) $97,910.72 of accrued interest earned to May 18, 2012.

Property Remaining to be Realized

116. Since its appointment, the Receiver has recovered and realized upon a significant portion of the Property of the Respondents. However, the Receiver continues to take steps to realize upon the remaining Property of the Respondents. The Property of the Respondents that remains to be realized upon, and the steps taken by the Receiver to date, are summarized below.

117. The Receiver will report to this Honourable Court at a future date with respect to the status of realization efforts in respect of all outstanding Property.

<u>Nelson Street Properties and St. Patrick's Drive Property</u>

118. Atcon Management Services Inc. ("**AMS**") was the registered owner of real property located in Miramichi, New Brunswick and identified as PID 40221426, PID 40219941, PID 40221434 (collectively, the "**Nelson Street Properties**") and PID 40466039 (the "**St. Patrick's Drive Property**"). The Nelson Street Properties comprised approximately 3.97 acres and are located across from the plywood mill formerly operated by Atcon Plywood. The St. Patrick's Drive Property is located near the Atcon Plywood mill.

119. The Nelson Street Properties and the St. Patrick's Drive Property were included in the Atcon Eastern Assets that were subject to the Tender Process. A sale of the Nelson Street Properties and the St. Patrick's Drive Property was approved by the Court on September 29, 2010; however, such sale transaction was not completed.

120. The Receiver subsequently listed the Nelson Street Properties and the St. Patrick's Drive Property with a qualified local real estate agent for 210 days from December 21, 2010 to June 30, 2011. No offers were received for the Nelson Street Properties and the St. Patrick's Drive Property during that time period.

121. The Receiver discussed potential realizations for the Nelson Street Properties and the St. Patrick's Drive Property with PwC, who was attempting to realize upon the property of Atcon Plywood. As a result of the lack of offers, the Receiver was of the view that the best method to maximize realizations for the Nelson Street Properties and the St. Patrick's Drive Property was to include the properties in an *en bloc* marketing of the assets by PwC.

122. PwC received offers for the purchase of certain assets of Atcon Plywood, which included an offer to purchase the Nelson Street Properties and the St. Patrick's Drive Property. The offer that was ultimately accepted by PwC allocated $24,000 to the purchase of the Nelson Street Properties and the St. Patrick's Drive Property as an *en bloc* amount. Based on an appraisal obtained by the Receiver, it was of the view that the *en bloc* price was supported by the properties' appraised values. As a result, the Receiver

recommended that the Court approve the sale of the Nelson Street Properties and the St. Patrick's Drive Property.

123. Pursuant to the Approval and Vesting Order of Justice Riordon dated August 15, 2011 granted in this proceeding, this Honourable Court approved the sale of the Nelson Street Properties and the St. Patrick's Drive Property. The Receiver understands that the purchaser failed to close the sale of the Nelson Street Properties and the St. Patrick's Drive Property by the June 15, 2012 deadline.

124. A motion was heard in the Atcon Plywood receivership proceeding on July 17, 2012 with respect to this matter. In that motion, PwC recommended that this Honourable Court approve a revised offer that was received from the purchaser that failed to close the previously approved transaction. Pursuant to an Approval and Vesting Order dated July 17, 2012 granted in this proceeding and an Approval and Vesting Order dated July 17, 2012 granted in the Atcon Plywood receivership proceeding, the revised offer was approved by this Honourable Court, with the condition that the purchaser had to provide its solicitor with funds by Friday July 20, 2012 at 5:00 pm AST. If this condition was not met, this Honourable Court authorized PwC to continue to market the Atcon Plywood property.

125. The Receiver understands that the purchaser did not comply with the condition and PwC will be taking steps to seek offers for the Atcon Plywood assets from potential purchasers. The Receiver will discuss with PwC the inclusion of the Nelson Street Properties and the St. Patrick's Drive Property in the offers being sought.

126. The Receiver will update this Honourable Court on the status of matters relating to the Nelson Street Properties and the St. Patrick's Drive Property at a later date.

<u>CRA Claims</u>

127. As has previously been reported, CRA issued notices of assessment dated February 26, 2010 to Atcon Construction in connection with alleged unremitted employee income tax, CPP and EI source deductions, along with certain penalties. The aggregate amounts of the assessments are in excess of $9.0 million. The Receiver understands that the amounts

contained in the assessments were originally assessed against Ledwell Construction Labour Limited, a third-party that provided services to Atcon Construction.

128. The Receiver filed notices of objection and appeals with the CRA in connection with the income tax, CPP and EI assessments and re-assessments of Atcon Construction related to such claims on May 21, 2010 and on June 7, 2010.

129. The Receiver received written confirmation dated October 21, 2011 that, notwithstanding the Receiver's notices of objection, the CRA appeals officer determined that the CPP/EI assessments for taxation years 2007, 2008 and 2009 remain payable by Atcon Construction, and that the CPP/EI assessments for taxation years 2005 and 2006 were cancelled as a result of the expiry of the applicable limitation periods. The Receiver received a similar written confirmation with respect to the income tax assessments.

130. The Receiver, following a discussion with representatives of the Bank, being the creditor with the primary interest in the recovery of the funds subject to the CRA claim, decided to appeal the CRA objections. As a result, the Receiver filed appeals with the Tax Court of Canada on January 18, 2012. The Department of Justice, on behalf of the Crown, issued replies to the Receiver's appeals on March 28, 2012. In the replies, the Crown takes the position that Atcon Construction is liable for the statutory payroll deductions withheld from the salaries for the individuals in question.

131. The Receiver is currently working with its legal counsel to prepare for document discoveries in connection with the appeals. The Receiver will update this Honourable Court on the status of the appeals at a later date.

Atcon Eastern Assets Real Property

132. The parcels of real property located in the Province of New Brunswick and listed on Appendix "E" attached hereto were offered for sale and were available for purchase as part of the Tender Process. The sale of the properties was not completed in the Tender Process, and the Receiver has taken steps to list the properties with a qualified local real estate agent.

Deh Cho

133. As previously reported, Atcon Construction was to provide engineering, bridge fabrication and design services to Deh Cho Bridge Corporation ("**DCBC**") in connection with the construction of a bridge across the Mackenzie River near Fort Providence, Northwest Territories. In December 2009, DCBC provided written notice of the termination of the Deh Cho contract to Atcon Construction.

134. Since its appointment, the Receiver has been, and continues to be, engaged in discussions with DCBC and the Government of the Northwest Territories with respect to the outstanding claims of Atcon Construction under the Deh Cho contract.

135. The receiver and its counsel expect to meet with representatives of the Government of the Northwest Territories and its counsel in the near future to advance settlement discussions between the parties.

Brun-way

136. Atcon Construction is the owner of a thirty per cent (30%) minority interest in Brun-way Highway Operations Inc. ("**Brun-way**"). Brun-way's business is focussed on the operation, maintenance and rehabilitation of 275 kilometres of highway that runs from the Quebec Border to west of Fredericton, and between Woodstock and the U.S. border.

137. The Receiver has periodically communicated with and engaged in discussions with SNC-Lavalin, the majority shareholder of Brun-way, regarding potential realization options for Atcon Construction's interest in Brun-way. Under the Brun-way unanimous shareholder agreement, SNC-Lavalin has the right to acquire Atcon Construction's interest in Brun-way for its fair market value. SNC-Lavalin has not chosen to exercise this right to date. In light of the positions of the parties, the Receiver expects that it may take a significant period of time to realize on the interests of Atcon Construction in Brun-way. The Receiver will provide an update to this Court at a later date.

Vanerply

138. As previously reported, the Atcon companies included two Swedish subsidiaries, OPI AB ("**OPI**") and Vanerply AB (now known as OPI Plywood AB) ("**Vanerply**"). OPI is a direct subsidiary of Atcon Group Inc. ("**Atcon Group**"), which granted security upon all of its property to the Bank. Vanerply is a direct subsidiary of OPI. The Receiver understands that neither Vanerply nor OPI have granted security to any of the Secured Creditors.

139. OPI is a holding company. Vanerply was in the business of manufacturing and distributing plywood for the domestic Swedish market as well as the export-market. Vanerply was a stand-alone business and was not involved in the businesses carried on by the Atcon companies.

140. The Atcon Group of Companies engaged a financial advisor in October 2009 to conduct a marketing and sale process for its interests in OPI and Vanerply. Following its appointment, the Receiver commenced discussions with OPI, Vanerply and the financial advisor regarding the sale process.

141. The Receiver conducted a review of the business and affairs of OPI and Vanerply with a view to determining how best to maximize the value of Atcon Group's direct share interest in OPI and its indirect share interest in Vanerply for the benefit of the Atcon Group receivership estate and its stakeholders. To that end, representatives of the Receiver travelled to Sweden, met with representatives of OPI and Vanerply, engaged Swedish professional advisors and had ongoing communications and discussions with OPI and Vanerply concerning the best method of recovering value for the Atcon Group receivership estate. The Receiver previously reported to the Court on the Vanerply sale transaction and certain related matters.

142. Following a lengthy sale process, an agreement of purchase and sale was entered into in May 2011 for the sale of the Vanerply business and certain real property located in Sweden. The sale transaction was subject to the approval of this Honourable Court. The sale transaction was supported by Vanerply management and the boards of OPI and

Vanerply. The Receiver was of the view that the sale transaction represented a reasonable realization on the assets and operations of Vanerply, and recommended that this Court approve the sale transaction.

143. Pursuant to an Approval Order of Justice Riordon dated June 15, 2011, the Vanerply sale transaction was approved by this Court.

144. As a result of the closing of the Vanerply sale transaction and the collection of accounts receivable and tax rebates, approximately $6.3 million is presently being held in Vanerply’s bank accounts. As OPI is a holding company, and Vanerply had sold its business, it was determined that the initiation of a mortification application and liquidation in Sweden was appropriate and necessary to wind-down both OPI and Vanerply, so that the net proceeds available following the completion of the processes could be distributed to the Receiver, in its capacity as receiver of Atcon Group, as a result of Atcon Group’s ownership of OPI and Vanerply.

145. The mortification application was published in the Swedish Gazette in October 2011, and a one-year period must elapse before a Swedish Court will decide if it will approve the mortification application to eliminate any uncertainty related to certain share certificates that had been issued but cannot be located, as previously reported to this Court. Magnus Knape, a Swedish resident, a Swedish lawyer, an experienced liquidator and member of the boards of OPI and Vanerply, agreed to act as liquidator for the liquidation of OPI and Vanerply (the “**Swedish Liquidator**”). The liquidation application was filed effective February 1, 2012, and the liquidation process is on going. As liquidator, Mr. Knape is in possession of the approximately $6.3 million of the net proceeds from the post-closing collection of accounts receivable and tax rebates, net of the payment of liabilities of Vanerply not assumed by the purchaser.

146. The Swedish Liquidator is not yet in a position to make distributions from Vanerply to OPI and from OPI to the Receiver of Atcon Group, the sole shareholders of OPI. The Receiver understands that the Swedish Liquidator will not be in a position to make such distributions until the early fall of this year, following the expiration of the claims periods in respect of the Vanerply and OPI liquidations and the OPI mortification process. The

Receiver intends to pursue the recovery of such distributions on account of Atcon Group's interest in Vanerply and OPI and to seek approval to distribute any such distributions to the stakeholder with the priority claim to such amounts.

<u>CNRL Contract Funds</u>

147. Atcon Construction provided a variety of contractor services to Canadian Natural Resources Ltd. ("**CNRL**") in the Province of Alberta. Gowling Lafleur Henderson LLP ("**Gowlings**"), in its capacity as counsel to Atcon Construction, received certain funds from CNRL in trust in connection with the services provided by Atcon Construction to CNRL (the "**CNRL Contract Funds**"). Gowlings released $129,843.55 of CNRL Contract Funds to the Receiver on April 19, 2012.

148. Gowlings has confirmed that it has in its trust account the aggregate amount of approximately $175,500 with respect to the CNRL Contract Funds (collectively, the "**Remaining CNRL Funds**").

149. Gowlings has taken the position that it is entitled to apply the Remaining CNRL Funds in satisfaction of the outstanding accounts owed to it by Atcon Construction in priority to all other parties with an interest in Atcon Construction's property. Both the Receiver and the Bank disagree with Gowlings' position.

150. Gowlings, the Receiver and the Bank engaged in settlement discussions with respect to the Remaining CNRL Contract Funds, but no settlement was able to be reached. As a result, the Receiver will be bringing a motion in this proceeding later this year to address entitlement to the Remaining CNRL Funds.

<u>Litigation</u>

151. The Receiver has commenced two actions in the Province of New Brunswick in connection with certain amounts owed to the Respondents based on their books and records.

152. The Receiver commenced an action on behalf of Atcon Group and AMS against Mr. Tozer, 504041 N.B. Ltd., and The Robert Tozer Family Trust (2008), being the

shareholders of Atcon Group (the "**Defendants**"). Atcon Group and AMS made a series of transfers of funds to the Defendants over a period of several years. As of August 3, 2010, the Defendants were indebted to Atcon Group in the amount of $632,834.80 and AMS in the amount of $83,198.04, for a total of $716,032.84. The Defendants have issued a statement of defence, denying that any amount is owed to either Atcon Group or AMS.

153. The Receiver also commenced an action on behalf of Atcon Holdings and Atcon Group against South West Forest Management Ltd. ("**South West**"), a company controlled by Mr. Tozer. Atcon Holdings and Atcon Group made a series of transfers of funds to South West over a period of several years. As of April 1, 2010, South West was indebted to Atcon Group in the amount of $385,578.68 and Atcon Holdings in the amount of $1,068,703.85. South West has issued a statement of defence, denying that any amount is owed to either Atcon Holdings or Atcon Group.

154. The Receiver intends to continue to pursue these actions and will provide an update on the status of the actions to this Honourable Court at a later date.

<u>MRDC</u>

155. Between 1998 and 2000, Atcon Constriction was the major excavation subcontractor for MRDC Construction Joint Venture ("**MRDC**"), which built the Fredericton-Moncton Highway. During the course of the work, numerous disputes arose between Atcon Construction and MRDC, which in turn led to various arbitrations and lawsuits. Between 2001 and 2005 approximately eight arbitrations were held, in which Atcon Construction was successful in seven and partially successful in the eighth.

156. At the time of the commencement of this proceeding and the CCAA Proceeding, New Brunswick counsel that previously represented Atcon Construction had worked with an expert to assess Atcon Construction's damages on the next claim to be arbitrated.

157. In an effort to determine whether there is any potential value to be realized for Atcon Construction's stakeholders in connection with any claims still to be arbitrated, the

Receiver has engaged Atcon Construction's former counsel to obtain its views on the remaining claims.

158. The Receiver continues to discuss this matter with counsel and will provide a status update to this Honourable Court at a later date.

1 Whalen Street

159. Atcon Construction was the owner of real property municipally known as 1 Whalen Street, Miramichi, New Brunswick ("**1 Whalen Street**"). The property was listed as part of the Tender Process and a single offer was received. The offer was below the appraised value of the property and thus was rejected by The Receiver. The Receiver listed the property with a qualified local real estate agent and subsequently entered into an agreement for the sale of the property for $17,000 based on an offer received.

160. Pursuant to the Vesting Order of Justice Riordon dated July 18, 2012 granted in this proceeding, this Honourable Court approved the vesting of 1 Whalen Street to the purchaser.

161. The Receiver expects to receive the net proceeds with respect to the sale of 1 Whalen Street by July 31, 2012 at which time they will be deposited into the Receiver's general operating account for use by the Receiver to make payments (including interim payments) required or permitted by the Receivership Orders.

Atcon Industrial

162. As noted above, certain of the Atcon Group of Companies were subject to the CCAA Proceeding in which EYI was appointed Monitor. Atcon Industrial was also subject to the CCAA Proceeding.

163. Following the completion of the CCAA Proceeding and the Court-appointment of EYI as Receiver and PwC as receiver of Atcon Industrial, the Receiver calculated a series of costs that were directly associated with preserving and protecting Atcon Industrial's assets during the CCAA Proceeding and were either paid directly by the Receiver or paid by Atcon Construction during the CCAA Proceeding. Such costs include wages and

benefits, equipment leasing charges, and certain applicable fees and disbursements of the Monitor and its counsel.

164. The Receiver is of the view that such costs served to benefit the secured creditors of Atcon Industrial and are properly allocated amongst the secured creditors of Atcon Industrial. The Receiver anticipates that the allocation and recovery of these costs will be addressed by PwC at a distribution hearing before this Honourable Court in the Atcon Industrial receivership proceeding.

CLAIMS AGAINST PROCEEDS OF REALIZATIONS

Court-Ordered Charges

165. In the course of this proceeding, certain priority charges have been granted by this Honourable Court against the Property of the Respondents. Such charges are as follows (collectively, the "**Court-Ordered Charges**"):

(a) "Administrative Charge" granted as security for payment of the reasonable fees and disbursements of the Receiver and its counsel, pursuant to paragraph 19 of the March 2 Order;

(b) "Receiver's Indemnity Charge" granted as security for all of the obligations of the Receiver incurred, pursuant to paragraph 23 of the March 2 Order;

(c) "Receiver's Borrowings Charge" granted as security for the payment of monies borrowed by the Receiver, pursuant to paragraph 26 of the March 2 Order; and

(d) "Replacement Charge" granted over all the Property of Atcon Construction that was subject to CRA notices of requirement to pay and the CRA Deemed Trust Claim, other than the CRA Deemed Trust Claim Holdback and the CRA Non-Deemed Trust Claim Holdback, as security for any deficiency faced by a builders' lien claimant or a secured creditor as a result of the establishment of the holdbacks and payment of the claims to CRA, pursuant to the June 18 Order.

166. Pursuant to the Receivership Orders, the Administrative Charge forms a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subject to environmental remediation claims under section 14.06(7) of the BIA, and secured claims for certain unpaid wages and pension plan amounts under sections 81.4(4) and 81.6(2) of the BIA (the "**BIA Claims**").

167. The Receivership Orders provide that the Receiver's Indemnity Charge stands in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subject to the Administrative Charge and the BIA Claims.

168. The Receivership Orders provide that the Receiver's Borrowings Charge stands in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subject to the Administrative Charge, the Receiver's Indemnity Charge, and the BIA Claims.

169. Pursuant to the June 18 Order, the Replacement Charge is subordinate to, among other things, the Administrative Charge, the Receiver's Indemnity Charge and the Receiver's Borrowing's Charge.

The Bank's Credit Facilities and Security

170. The Bank was the operating lender to the Atcon Group of Companies and its affiliates pursuant to credit facilities entered into in 2006 and 2007. The Bank also provided a term loan facility to the Atcon Group of Companies and its affiliates to re-finance certain pre-existing term loans.

171. The Bank obtained guarantees in connection with such credit facilities, and obtained a general security agreement from the borrower and each guarantor, along with collateral mortgages from certain of the guarantors as security for the obligations owed to the Bank.

172. In June 2009, the Bank acquired the debt owing to, and the security in favour, of MG Stratum Fund III, Limited Partnership and Roynat Capital Inc. (collectively, the "**Sub-Debt Lenders**"), who were lenders to the Atcon Group of Companies and its affiliates

pursuant to credit facilities entered into in April 2006, as amended. The Sub-Debt Lenders had obtained guarantees in connection with the credit facilities and obtained a general security agreement from the borrower and each guarantor, along with debentures over real property from certain of the guarantors, as security for the obligations owed to the Sub-Debt Lenders. The Sub-Debt Lenders assigned their debt and security documents to the Bank in June 2009 following payment by the Bank to the Sub-Debt Lenders of amounts equal to the amounts owing to the Sub-Debt Lenders.

173. In connection with June 2009 re-financing, the Province provided: (i) a $20,000,000 guarantee to the Bank in connection with the repayment of the loans to the Sub-Debt Lenders; (ii) a $20,000,000 guarantee to the Bank in connection with a working capital term loan; (iii) a $10,000,000 guarantee to the Bank in connection with a capital expenditures loan; and (iv) a guarantee with respect to the $13.36 million letter of credit that was issued in connection with the Deh Cho project.

174. As all of the Property of the Respondents realized to date was located in either New Brunswick, Newfoundland & Labrador, Alberta or Northwest Territories, the Receiver engaged Borden Ladner Gervais LLP ("**BLG**"), along with Mr. Harry H. Williamson, Q.C. in New Brunswick, the law firm of Ottenheimer Baker ("**Ottenheimer**") in Newfoundland & Labrador and the law firm of Lawson Lundell LLP ("**Lawson**") in Northwest Territories to provide opinions and advice to the Receiver in connection with the security granted by the Respondents to the Bank and governed by the laws of New Brunswick, Newfoundland & Labrador, Alberta and Northwest Territories. Copies of the opinions received by the Receiver are attached hereto as **Appendix "F"**. (In the course of this report, references are made to the Receiver's understanding in connection with registrations made under personal property and real property security and registration laws in the jurisdictions mentioned above. The Receiver's understandings of these matters arise from its reviews of information it acquired as Receiver and reports and advice it received from the law firms mentioned above.)

175. More specifically, the Receiver requested:

(a) opinions under the laws of the Provinces of New Brunswick, Alberta and Newfoundland & Labrador, and the Northwest Territories as to the validity and enforceability of the security held by the Bank against the personal property of the Atcon Group of Companies governed by the *Personal Property Security Act* (the "**PPSA**") of each jurisdiction;

(b) an opinion under the laws of the Province of New Brunswick as to the validity and enforceability of the security held by the Bank against leasehold interests in real property, and licenses to remove aggregates from certain quarries located in New Brunswick, held by certain of the Respondents;

(c) an opinion under the laws of the Province of New Brunswick as to the validity and enforceability of the security held by the Bank against the real property of the Respondents listed on **Appendix "G"** attached hereto, which security was either currently registered against title to the real property under the *Land Titles Act* (New Brunswick) or the *Registry Act* (New Brunswick) or was previously registered against title prior to the sale of such real property to a third party pursuant to an Approval and Vesting Order granted by this Court in this proceeding or the CCAA Proceeding or otherwise; and

(d) an opinion under the laws of the Province of New Brunswick as to the validity and enforceability of the general charging language contained in the assigned general security agreements that the Bank has security interests against "all such Debtor's present and after-acquired personal property and on all of the present and future undertaking and property, <u>either real</u>, personal, or movable, of such Debtor (<u>emphasis added)</u>" and that the Bank has security interests against the real property of the Respondents listed on Appendix "G" and not otherwise subject to a specific collateral mortgage or debenture in favour of the Bank.

<u>New Brunswick</u>

176. The Receiver has obtained an opinion from its New Brunswick counsel that provides, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, that:

(a) the Bank has valid and enforceable security against all of the present and after-acquired personal property of each of the Respondents governed by the New Brunswick PPSA; and

(b) the security interests in favour of the Bank in all of the present and after-acquired personal property of each of the Respondents have been perfected by registration under the provisions of the New Brunswick PPSA and were perfected as of the applicable date of bankruptcy of each of the Respondents.

177. Additionally, with respect to the real property of the Respondents located in the Province of New Brunswick subject to collateral mortgages and/or debentures in favour of the Bank and identified on Appendix "G", the Receiver has obtained an opinion that, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, the collateral mortgages and debentures create, under the laws of the Province of New Brunswick, valid mortgages and charges in favour of the Bank in the applicable real property, and the mortgages and charges created by the collateral mortgages and debentures have been, or were, registered in favour of the Bank in the appropriate land title offices maintained in the Province of New Brunswick in respect of the applicable real property and are enforceable as against the Trustee of the applicable Respondent.

178. Lastly, the Receiver has obtained an opinion from its New Brunswick counsel that, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, a New Brunswick Court likely would hold that the general charging language contained in the Bank's security documents is sufficient to create a charge against the leasehold interests, quarry licenses, and real property held by certain Respondents, listed on Appendix "G" and not subject to

registered charges in favour of the Bank, and such charges would be enforceable by the Bank against leasehold interests, quarry licenses and real property of the Respondents in the Province of New Brunswick in priority to the rights of the Trustee of the Respondents.

<u>Alberta, Newfoundland & Labrador and Northwest Territories</u>

179. The Receiver has obtained opinions from its Alberta, Newfoundland & Labrador and Northwest Territories counsel that provide, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, that:

(a) the Bank has valid and enforceable security against all of the present and after-acquired personal property of each of the Respondents governed by the Alberta, Newfoundland & Labrador and Northwest Territories PPSAs; and

(b) the security interests in favour of the Bank in all of the present and after-acquired personal property of each of the Respondents have been perfected by registration under the provisions of the Alberta, Newfoundland & Labrador and Northwest Territories PPSAs and were perfected as of the date of bankruptcy of each of the Respondents.

180. Based on the foregoing and the opinions from the Receiver's counsel, the Receiver understands that all of the Property of the Respondents is subject to security held by the Bank (collectively, the "**Bank Collateral**").

181. The Receiver has been advised by the Bank that, as of July 9, 2012, the outstanding indebtedness, liabilities and obligations of Atcon Group of Companies, as secured by the Bank's security described above, inclusive of accrued interest, professional fees and applicable penalties, is approximately $28.79 million.

<u>G.E.</u>

182. The Receiver understands that G.E. provided $2.0 million in financing to Atcon Industrial pursuant to a Mortgage Loan Agreement dated May 30, 2007, that Atcon

Construction was a guarantor under the agreement and the loan was to be secured by a first-ranking mortgage on General Manson Way. The Receiver understands that G.E. registered collateral mortgages against General Manson Way on July 31, 2007.

183. In 2006 and 2007, collateral mortgages were registered against General Manson Way in favour of the Sub-Debt Lenders and the Bank; however, in February 2010, a postponement agreement was entered into between the Bank and G.E., which the Receiver understands provided that the Bank subordinated its security over General Manson Way in favour of G.E.'s security. The Receiver understands that the postponement agreement was registered on title to General Manson Way.

184. The Receiver has obtained an opinion from its New Brunswick counsel that provides, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, that G.E. has valid and enforceable collateral mortgages against the General Manson Way Property, and such collateral mortgages were registered in favour of G.E. in the appropriate land title offices maintained in the Province of New Brunswick in respect of General Manson Way and are enforceable as against the Trustee of Atcon Construction. A copy of the opinion is attached hereto as **Appendix "H"**.

185. The Receiver has been advised by G.E. that, as of April 26, 2012, the outstanding indebtedness, liabilities and obligations of Atcon Construction to G.E., as secured by G.E.'s collateral mortgages discussed above, inclusive of accrued interest, professional fees and applicable penalties, is in excess of $10.5 million.

<u>Aviva</u>

186. The Receiver understands that Atcon Construction granted a collateral mortgage to Aviva with respect to PID 10208858 and PID 70245741 as collateral security for payment to Aviva, on demand, of all debts and liabilities owed by Atcon Construction and Atcon Holdings to Aviva by virtue of an indemnity agreement provided by Atcon Construction and Atcon Holdings to Aviva. The Receiver understands that the indemnity agreement is

with respect to certain surety bonds issued by Aviva at the request of Atcon Construction in connection with construction projects in which Atcon Construction was involved.

187. The Receiver obtained an opinion from its New Brunswick counsel in connection with the Aviva collateral mortgages over PID 10208858 and PID 70245741. The opinion provides, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, that Aviva has valid and enforceable collateral mortgages against PID 10208858 and PID 70245741, the Aviva collateral mortgages were registered in favour of Aviva in the appropriate land title offices maintained in the Province of New Brunswick and the Aviva collateral mortgages are enforceable as against the Trustee of Atcon Construction. A copy of the opinion is attached hereto as **Appendix "I"**.

188. The Receiver has been advised by Aviva that, as of July 10, 2012, the outstanding indebtedness, liabilities and obligations of Atcon Construction to Aviva, as secured by Aviva's collateral mortgages discussed above, is approximately $460,780. The Receiver understands that such amount is largely comprised of legal, adjusting, consulting and appraisal expenses incurred by Aviva, with amounts totally approximately $91,000 paid by Aviva to settle claims.

<u>Caterpillar</u>

189. The Receiver understands that Atcon Construction, APH and AMS are parties to a guarantee dated June 16, 2005 whereunder each party guaranteed to Caterpillar the obligations of Atcon Holdings with respect to a $2.004 million promissory note dated June 16, 2005. The Receiver understands that, as security for the obligations owed to Caterpillar under the guarantee:

(a) APH granted a collateral mortgage in favour of Caterpillar with respect to PID 40095887, PID 40179798 and PID 40441917; and

(b) Envirem granted a collateral mortgage in favour of Caterpillar with respect to PID 40450389.

190. The Receiver has obtained an opinion from its New Brunswick counsel that provides, subject to what the Receiver understands to be and BLG has advised are customary assumptions and qualifications in an insolvency context, that Caterpillar has valid and enforceable collateral mortgages against PID 40095887, PID 40450389 and PID 40441917, and the Caterpillar collateral mortgages were registered in favour of Caterpillar in the appropriate land title offices maintained in the Province of New Brunswick and are enforceable as against the Trustees of APH and Envirem. A copy of the opinion is attached hereto as **Appendix "J"**.

191. The Receiver has been advised by Caterpillar that, as of July 31, 2012, the outstanding indebtedness owed to Caterpillar, as secured by Caterpillar's collateral mortgages discussed above, is approximately $814,144.

<u>The Province</u>

192. As has been previously reported to this Honourable Court, in 2009 the Province guaranteed certain of the obligations of certain of the Respondents to the Bank.

193. The Receiver understands that the Province has made a payment to the Bank under the guarantees and as a consequence, certain proceeds that otherwise would be payable to the Bank under its security are payable to the Province. The Province has confirmed that it is owed in excess of $50,000,000.

194. The Bank and the Province have agreed that the amount of $340,879.90 should be paid to the Province out of the proceeds of certain of the property subject to the Bank's security, subject to the approval of the Court. The Receiver is satisfied, based on the opinions that it has received in respect of the Bank's security that the Bank and, through it, the Province are entitled to the proposed payment and distribution in the amount of $340,879.90.

PROPOSED DISTRIBUTIONS

195. As set out above, this Honourable Court has granted certain Court-Ordered Charges in the context of this proceeding that take priority over all other claims and encumbrances

against the Property of the Respondents, subject to specific provisions with respect to the priority of the Court-Ordered Charges amongst themselves.

196. To date, the mechanism to be utilized regarding payment of the amounts secured by the Court-Ordered Charges (other than the Replacement Charge) has been set out solely in paragraph 25 of the March 2 Order, which provides that:

> THIS COURT ORDERS that the costs, fees, expenses and liability of the Receiver giving rise to the Administrative Charge, the Receiver's Indemnity Charge and the Receiver's Borrowings Charge… shall be paid in the following manner unless otherwise ordered by this Court:
>
> (A) Firstly, applying the costs incurred in the receivership proceedings specifically attributable to an individual asset or group of assets against the realizations from such asset or group of assets;
>
> (B) Secondly, applying the costs *pro rata* against all of the assets based on the net realization from such asset or group of assets; and
>
> (C) Thirdly, applying non-specific costs incurred in the receivership proceedings *pro rata* against the assets based on the net realization from such asset or group of assets

197. As a result, before a distribution of the realized proceeds of the Property of the Respondents could be made to the stakeholders of the Respondents entitled to such proceeds, the Orders require the Receiver to:

(a) determine the direct costs of the Receiver and its counsel that were incurred with respect to the realization of such Property of the Respondents and apply such costs against the proceeds;

(b) to the extent that the direct costs cannot be satisfied from the realization of such Property of the Respondents, applying such unsatisfied direct costs against all of the proceeds of the Respondents on a *pro rata* basis; and

(c) determine the non-specific costs of the Receiver and its counsel incurred in this proceeding generally and apply such costs against the proceeds of the Property of the Respondents on a *pro rata* basis.

198. In considering a proposed distribution and allocation of the Court-Ordered Charges, the Receiver recognized that, given the nature, location and amount of Property of the Respondents that has been collected to date, a determination of the direct and indirect costs attributable to the realization of the Property of the Respondents would be time-consuming and costly task for the receivership estate, and could not be completed before the finalization of these receivership proceedings, the realization of all Property and the accrual of all costs.

199. As a result, the Receiver determined that it would be prudent to consult with the five (5) Secured Creditors with an interest in the Property of the Respondents to determine whether a fair and equitable basis to allocate the Court-Ordered Charges could be agreed to so that additional costs and delay could be avoided.

200. With respect to the allocation of the Administrative Charge to the property subject to the security held by Caterpillar and Aviva, the Receiver, following a consideration of a variety of proposals and calculations, proposed that a uniform 15% of the net realization proceeds be applied towards the costs of insurance, preservation of the assets, conducting sales processes and general administration of these receivership proceedings. With respect to the G.E. claim against the General Manson Way Property, the Receiver proposed that 5% of the net realization proceeds be applied towards an allocation of the costs related to the general administration of these receivership proceedings, as PwC, in its capacity as Court-appointed receiver of Atcon Industrial, satisfied the insurance, preservation and selling costs for the General Manson Way Property.

201. With respect to the Replacement Charge, the Receiver determined that, excluding the funds held in the CRA Deemed Trust Holdback and the CRA Non-Deemed Trust Holdback, an aggregate amount of approximately $12.9 million of Property of Atcon Construction has been realized to date.

202. The Receiver engaged in discussions with representatives of the Bank and the Province regarding the proposed allocation of the Administrative Charge and the Replacement Charge to the Property of the Respondents. The Receiver obtained confirmation from the Province and the Bank of their support of the proposed allocations set out in Schedule

"C" attached hereto, and the Receiver then engaged in discussions with counsel to Aviva, Caterpillar and G.E.

203. The Receiver is pleased to report to this Honourable Court that, as a result of such discussions, the following distributions have been agreed to, as set out in the executed Consent signed by counsel to the Secured Creditors attached hereto as **Appendix "K"**:

(a) the sum of $808,629.63, to Caterpillar on account of its security in the Caterpillar Collateral;

(b) the sum of $416,074.87 to G.E. on account of its security in the G.E. Collateral;

(c) the sum of $174,076.42 to Aviva on account of its security in the Aviva Collateral; and

(d) the sum of $340,879.90 to the Province on account of its security in the Province Collateral;

204. With respect to proposed distributions to the Bank, the Receiver is of the view that it is necessary to maintain certain funds in its account in anticipation of additional fees and expenses to be incurred by the Receiver in continuing to administer these receivership proceedings in the near future, including taking continued steps to realize upon the Property of the Respondents for the benefit of the Bank and the Province.

205. As a result, the Receiver proposed, and the Province and the Bank have agreed, that the Receiver would maintain $1,000,000.00 in its account and distribute $7,314,321.14 to the Bank on account of the valid and enforceable security each party holds over certain of the Property of the Respondents that generated the realization proceeds.

206. The Receiver reports that, in anticipation of the motion to be heard with respect to the issues detailed in this Twenty-Third Report, the Receiver has been advised by its counsel that a copy of the Receiver's Record on Motion will be sent to each party currently on the service list maintained by the Receiver's counsel in this proceeding and to each party not on the service list that had a personal property security registration against the Atcon Group of Companies in the Province of New Brunswick, Province of Newfoundland &

Labrador, the Province of Alberta, and the Northwest Territories as of September 2011, along with parties that had real property registrations against real property owned by the Atcon Group of Companies in the Province of New Brunswick.

RECOMMENDATIONS AND REQUESTS

207. As set out above, each of the Secured Creditors with a proprietary interest in the realization proceeds of the Property of the Respondents has agreed to the proposed distribution of the proceeds and the proposed allocation of the Court-Ordered Charges as described in this report.

208. The Receiver is of the view that the proposed distributions provide for a fair and equitable allocation of the Court-Ordered Charges against the realization proceeds and the Secured Creditors agreements avoids the additional costs and delay that would result from a detailed allocation of all of the receivership estate costs to particular Property of the Respondents and accelerates the timing of the proposed distributions to the stakeholders of the Respondents.

209. As a result, the Receiver requests that this Honourable Court approve the proposed distributions and approve the conduct, actions and activities of the Receiver in administering these receivership proceedings to date, including the conduct, actions and activities of the Receiver set out in this Twenty-Third Report and all other reports previously filed by the Receiver in these receivership proceeding to date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2012

ERNST & YOUNG INC.
in its capacity as the Court-appointed
Receiver of the Respondents and not in its
personal or corporate capacity

By:

Paul D. Hickey, CA•CIRP
Senior Vice President

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